In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 576

JOHN J. FAHEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. iv–viii) is reported at 411 F. 2d 1213.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1969, and petition for rehearing was denied on August 13, 1969. (Pet. viii, ix.) The petition for a writ of certiorari was filed on September 11, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether an intention to defraud the government of taxes owed is an essential element of the misde-

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meanor of willful failure to file an income tax return.

2. Whether the element of willfulness in the misdemeanor of willful failure to file an income tax return is satisfied by a showing that the taxpayer acted (*i.e.*, failed to file) without grounds for believing that his act was lawful, or without reasonable cause, or capriciously, or with a careless disregard whether he had a right so to act.

STATEMENT

Petitioner was charged by an information in three counts with having willfully failed to file income tax returns for the years 1960, 1961, and 1962, in violation of Section 7203 of the Internal Revenue Code of 1954. (I–R. 1–3.) After a jury-waived trial in the United States District Court for the Northern District of California, petitioner was found guilty on all counts and was sentenced. (I–R. 35–36, 42.)

The district court made findings of fact in substance as follows (I–R. 31–34):

During the years 1960, 1961, and 1962 and at all times since then, petitioner was a member of the California bar engaged in the general practice of law, particularly criminal law, and had sufficient income so as to be required by law to file federal income tax returns. When interviewed by a Special Agent of the Internal Revenue Service on December 2, 1963, petitioner admitted that he had filed no returns for the years here involved and that his gross income during those years was between $30,000 and $35,000 for each year. His explanation was that he had lacked time to prepare such returns because of pressure and

attendance to the affairs of his clients. On December 23, 1963, petitioner filed, with the Special Agent, income tax returns for 1960 and 1962, and he filed his return for 1961 on April 2, 1964. Aside from the returns just mentioned, the court found[1] that petitioner had filed no federal income tax returns and no declarations of estimated income for any year since 1959, and had filed no State of California income tax returns during the same period, although he was by law required to do so.

The court found, further, as follows (I–R. 33–34):

> 10. The Defendant was at all times material fully aware that the law contained criminal sanctions for the willful failure to file timely income tax returns.
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> 11. Notwithstanding the existence of emotional and psychological problems which the Defendant had and which were likely attributable to personal domestic circumstances, together with time-consuming professional pressures, the Defendant was nonetheless sane throughout the period beginning 1960 and continuing to date. Further, the Defendant knew the difference between right and wrong and was particularly aware and informed of the criminal penalties in respect to the willful failure to file federal income tax returns.
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> 12. The failure of the Defendant to timely file federal income tax returns for each of the years 1960, 1961 and 1962 was in each instance of omission a voluntary, deliberate, intentional and purposeful act on his part, and with bad

[1] The court's findings of fact are dated March 6, 1968. (I–R. 34.)

> purpose in that by his particular knowledge, professional training and experience, and by virtue of his previous experience in the filing of his personal income tax returns prior to 1960, the Defendant was aware that there were no reasonable or justifiable grounds for failure to timely file such tax returns.

At the trial, a psychiatrist testified that in his opinion petitioner had suffered from an anxiety neurosis attributable to professional and domestic pressures but that petitioner had been and was sane. (III–R. 14, 16, 28.) In his opinion, petitioner's condition did not excuse his delinquencies but only served in mitigation. (III–R. 34–36.) Petitioner could not be said to have been driven by an "irresistible impulse". (III–R. 16.)

The district court wrote a memorandum decision (Pet. ii–iii), stating, *inter alia,* that (Pet. iii) "The Government has failed to establish that the defendant intended to defraud the Government of tax revenues due it", but that "[s]uch is not a requisite element of the misdemeanor defined in Section 7203". The court of appeals affirmed. (Pet. viii.)

ARGUMENT

The decision below is clearly correct and no conflict of authority is involved.

1. The district court found that petitioner was sane, that he was "aware and informed of the criminal penalties in respect to the willful failure to file federal income tax returns" (I–R. 33–34), and that petitioner's "failure to timely file" his tax returns

"was in each instance of omission a voluntary, deliberate, intentional and purposeful act on his part, and with bad purpose in that * * * [he] was aware that there were no reasonable or justifiable grounds for failure to timely file such tax returns" (I–R. 34). Petitioner's sole contention (Pet. 4–5) is that the court of appeals erred in failing to require, in addition, that petitioner be found to have intended to defraud the government. This contention is incorrect and is directly contrary to the observations of this Court in *Spies* v. *United States,* 317 U.S. 492, and in *Sansone* v. *United States,* 380 U.S. 343.

In *Spies* v. *United States, supra,* it was observed (317 U.S. at 496) that a duty to make a timely return "may exist even when there is no tax liability to serve as a base for application of a percentage delinquency penalty", and stated further (*ibid.*):

> Hence the willful failure to make a return, keep records, or supply information when required, is made a misdemeanor, without regard to existence of a tax liability. § 145(a). Punctuality is important to the fiscal system, and these are sanctions to assure punctual as well as faithful performance of these duties.

Since it is a misdemeanor [2] to fail willfully to file a

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[2] Internal Revenue Code of 1954:

"SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to

return "without regard to existence of a tax liability", it follows that an intention to cheat or defraud is not a necessary element of the offense. One who owes no tax avoids no tax liability by failing to file a return and ordinarily could have no purpose to defraud, but must nevertheless file a return if he has gross income of $600 or more.[3] In making a specified amount of gross income the touchstone of the requirement that a return be filed, Congress intended to supply the revenue authorities with information from which *they* can ascertain whether a tax liability exists or not. In order to insure performance of the duty to file returns, it is necessary to impose a criminal penalty for any intentional failure to file, regardless of whether it may turn out that a tax is owed. Mere civil penalties would not suffice, since a person

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pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

(26 U.S.C. 7203.)

[3] Internal Revenue Code of 1954:

"SEC. 6012. PERSONS REQUIRED TO MAKE RETURNS OF INCOME.

"(a) *General Rule.*—Returns with respect to income taxes under subtitle A shall be made by the following:

"(1) Every individual having for the taxable year a gross income of $600 or more (except that any individual who has attained the age of 65 before the close of his taxable year shall be required to make a return only if he has for the taxable year a gross income of $1,200 or more);

* * * * *

(26 U.S.C. 6012.)

who owed no tax could then safely ignore the duty to file, even if he had a *gross* income of $600 or more, because there would be "no tax liability to serve as a base for application of a percentage delinquency penalty". *Spies* v. *United States, supra,* p. 496.

The fact that an intention to cheat or defraud the government of taxes is not a required element of Section 7203 is further illustrated in *Sansone* v. *United States,* 380 U.S. 343, 354, where it was stated that "the intent to report the income and pay the tax sometime in the future does not vitiate the willfulness required by §§ 7203 and 7207". In the present case, petitioner's position was that he intended to file returns and pay his taxes and simply procrastinated for years in doing so (until after the stimulation of a visit from an agent of the Internal Revenue Service). *Sansone* shows that such an intention would be no defense. As stated in *Spies, supra,* "[p]unctuality is important to the fiscal system".

2. This case involves no conflict of authority. Petitioner suggests a conflict between the Ninth Circuit's definition of willfulness as meant in Section 7203 ("capriciously or with a careless disregard whether one has a right so to act", etc.—Pet. vii), and the rejection of instructions incorporating the Ninth Circuit's definition by the Third Circuit in *United States* v. *Vitiello,* 363 F. 2d 240, and other cases, and by the Fifth Circuit in *Haner* v. *United States,* 315 F. 2d 792. In the cases referred to by petitioner, the Third and Fifth Circuits rejected the Ninth Circuit's formulation of a definition of willfulness because of

the possibility that the jury would interpret "careless disregard" as the equivalent of carelessness or negligence. The present case, however, does not raise that conflict, because the district court explicitly found that petitioner was fully aware of his duty and that each of petitioner's failures to file returns was "a voluntary, deliberate, intentional and purposeful act". (I–R. 34.) In other words, the trial court unambiguously found that petitioner's acts were intentional and not merely careless or negligent.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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